A **KWAN CHEW HOLDINGS SDN BHD**

v.

KWONG YIK BANK BHD

B COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD NOOR AHMAD JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: N-02-573-1997]
C 29 OCTOBER 2009

LAND LAW: *Charge - Order for sale - Setting aside - Whether order for sale wrongly granted - Failure to comply with statutory provisions of O. 83 r. 3(6) Rules of the High Court 1980 - Statutory demand in Form 16D* D *for sum greater than that owed by defendant - Whether wrongful demand for payment constitute cause to the contrary under s. 256 of the National Land Code*

E This was an appeal against the decision of the High Court Judge granting the plaintiff (the respondent in this appeal) an order for sale of 31 pieces of land ('the said lands') which was charged under the provisions of the National Land Code ('the Code') by the defendant (the appellant in this appeal) in favour of the plaintiff. The defendant, a locally incorporated company, executed three F charges respectively over the said lands to secure a loan. Based on these securities, the plaintiff, a bank, disbursed the facilities to the defendant. Subsequently, by originating summons dated 9 April 1996, the plaintiff prayed against the defendant for, *inter alia*, an order for sale of the said lands. The application for order for sale G was made pursuant to the defendant's default in the repayment of banking facilities and failure to comply with the notice in Form 16D under s. 254 of the Code. In its defence, the defendant, *inter alia*, denied the plaintiff's claim that there was a balance of RM1,895,825.13 owing by them to the plaintiff. The defendant also H pointed out that the sum of RM649,915.49 claimed as 'amount advanced' was not true at all and contended it was clearly evidenced by the plaintiff's own bank statements that the total principal sum advanced by the plaintiff to the defendant pursuant to the secured bridging loan was only RM470,360.61. The learned judge of the I High Court was of the view that based on the decision in *Low Lee Lian*, differences in the statements of account did not amount to

cause to the contrary under s. 256(3) of the Code. In conclusion, the High Court ruled that the defendant had failed to show any cause to the contrary under s. 256(3) of the Code and as such allowed the plaintiff's application. Hence, this appeal.

Held (allowing the appeal with costs; setting aside order for sale) Per Mohd Ghazali Yusoff JCA:

(1) The plaintiff had failed to comply with the statutory provisions of O. 83 r. 3(6) of the Rules of the High Court 1980 which provides that where the plaintiff claimed payment of monies secured by the charge, the affidavit must prove that the money was due and payable and give the relevant particulars. The plaintiff's supporting affidavit and the subsequent affidavits did not state the correct statutory particulars, namely: (i) the correct amount of the advance; (ii) the correct interest in arrears; (iii) the correct amount remaining due under the charge. Further, since the statutory demand in Form 16D was for a sum greater than that owed by the defendant, it was accordingly a wrongful demand for payment and that would certainly constitute cause to the contrary. The learned judge failed to deal with these issues in making the decision that he did. (paras 16 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Hakim Mahkamah Tinggi yang membenarkan plaintif (responden dalam rayuan ini) perintah penjualan bagi 31 bidang tanah ('tanah-tanah tersebut') yang digadaikan di bawah peruntukan-peruntukan Kanun Tanah Negara ('Kanun') oleh defendan (perayu di dalam rayuan ini) yang berpihak kepada plaintif. Defendan, sebuah syarikat tempatan, melaksanakan tiga gadaian ke atas tanah-tanah tersebut untuk mendapatkan pinjaman. Berdasarkan sekuriti-sekuriti tersebut, plaintif, sebuah bank, telah memberi fasiliti-fasiliti kepada defendan. Kemudiannya, melalui saman pemula bertarikh 9 April 1996, plaintif memohon terhadap defendan untuk, antara lain, satu perintah penjualan tanah-tanah tersebut. Permohonan perintah penjualan telah dibuat mengikut kegagalan defendan untuk membayar balik fasiliti-fasiliti bank dan kegagalan memenuhi notis Borang 16D di bawah s. 254

A Kanun. Di dalam pembelaannya, defendan, antara lain, menafikan permohonan plaintif bahawa terdapatnya baki RM1,895,825.13 yang defendan masih hutang kepada plaintif. Defendan juga berhujah bahawa amaun RM649,915.49 yang dipohon sebagai 'amount advanced' tidak benar sama sekali dan menunjukkan bahawa ia jelas
B dari penyata-penyata bank plaintif sendiri yang keseluruhan jumlah utama yang didahulukan plaintif kepada defendan mengikut jaminan kemudahan kewangan bersepadu hanya RM470,360.61. Hakim Mahkamah Tinggi berpendapat berdasarkan keputusan *Low Lee Lian*, perbezaan-perbezaan di dalam penyata akaun tidak membawa kepada
C sebab bertentangan di bawah s. 256(3) Kanun. Kesimpulannya, Mahkamah Tinggi memutuskan bahawa defendan telah gagal menunjukkan sebab bertentangan di bawah s. 256(3) Kanun dan oleh itu telah membenarkan permohonan plaintif. Seterusnya, rayuan ini.

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Diputuskan (membenarkan rayuan dengan kos; mengenepikan perintah penjualan)
Oleh Mohd Ghazali Yusoff HMR:

E **(1)** Plaintif gagal mengikut peruntukan A. 83 k. 3(6) Kaedah-kaedah Mahkamah Tinggi 1980 yang menyatakan bahawa untuk plaintif memohon pembayaran wang yang dijaminkan oleh gadaian, afidavit mesti membuktikan wang yang perlu dibayar dan memberi butir-butir yang relevan. Afidavit sokongan plaintif
F dan afidavit-afidavit kemudiannya tidak memberi butir-butir yang betul, seperti (i) jumlah pendahuluan yang betul; (ii) jumlah faedah tertunggak yang betul; (iii) jumlah yang betul yang masih berada di bawah gadaian. Seterusnya, kerana tuntutan statutori di dalam Borang 16D adalah untuk jumlah yang
G melebihi apa yang dihutang oleh defendan, ia adalah tuntutan bayaran yang salah dan ini boleh membawa kepada sebab bertentangan. Hakim Mahkamah Tinggi gagal mempertimbangkan isu-isu ini dalam membuat keputusannya.

Case(s) referred to:
H *Bank Pertanian Malaysia v. Zainal Abidin Kassim & Anor [1995] 1 LNS 33 HC* ***(foll)***
Citibank NA v. Ibrahim Othman [1993] 1 LNS 104 HC ***(foll)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(foll)***

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Legislation referred to:
Limitation Act 1953, s. 21(5)
National Land Code s. 254, s. 256(3), 340
Rules of the High Court 1980, O. 83 rr. 3(3), (6)

For the appellant - Ramdas Tikamdas; M/s Siva, Ram & Assocs
For the respondent - Leong Wai Heong (June Tan Mei Ling with him); M/s Skrine

[Appeal from High Court, Seremban; Originating Summons No: 24-156-1996]

[Editor's note: For the High Court judgment, please see Kwong Yik Bank Bhd v. Kwan Chew Holdings Sdn Bhd [1997] 1 LNS 121.]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Ghazali Yusoff JCA:

[1] This is the unanimous judgment of the court.

[2] This is an appeal against the decision of Mohd Noor Abdullah J (as he then was). The learned judge of the High Court granted to the plaintiff (the respondent in this appeal) an order for sale of 31 pieces of land ("the said lands") which was charged under the provisions of the National Land Code ("the Code") by the defendant (the appellant in this appeal) in favour of the plaintiff. We will refer to the parties as they were in the High Court.

[3] We had allowed the appeal with costs and ordered that the order for sale be set aside. We further ordered that the deposit be remitted to the defendant to account of taxed costs. The following are our reasons for the decision that we made.

The Background

[4] On 7 January 1984, 25 April 1984 and 25 September 1984 the defendant, a locally incorporated company executed three charges respectively over the said lands to secure a loan of RM550,000. Based on these securities, the plaintiff, a bank disbursed the facilities to the defendant.

[5] By letter dated 20 September 1995, the plaintiff through its solicitors demanded from the defendant payment of the sum of RM1,832,893.46 being the amount owing by the defendant to the plaintiff, as at 13 September 1995 together with interest thereon at the rate of 3.5% above the plaintiff's base lending rate ("BLR") per annum with monthly rests to be made within 7 days to the date thereof failing which foreclosure proceedings would be instituted.

[6] On 18 October 1995 the plaintiff's solicitors sent by hand to the defendant a notice in Form 16D under s. 254 of the Code dated 13 October 1995 calling on the defendant to remedy the breach committed under the three charges within 14 days from the service of the notice. The defendant did not comply with the notice and hence the plaintiff applied to the High Court for an order for sale.

[7] By originating summons dated 9 April 1996 the plaintiff prayed against the defendant for, *inter alia*, an order for sale of the said lands. The application for order for sale was made pursuant to the defendant's default in the repayment of banking facilities and failure to comply with the notice in Form 16D under s. 254 of the Code.

[8] It was the plaintiff's claim that the statement of account of the monies owing by the defendant as at 31 December 1995 stood as follows:

(i) amount advanced	RM649,915.49
(ii) total amount of repayments	- nil -
(iii) total amount of interest in arrears	RM1,245,909.64
(iv) balance outstanding as at 31 December 1995	RM1,895,825.13

and that after 1 January 1996, interest will continue to accrue at the rate of 3.5% above the plaintiff's BLR per annum calculated on monthly rests until the date of full payment; the daily interest is currently at RM610.30 until capitalisation of interest on 31 January 1996.

[9] In its defence the defendant, *inter alia*, denied the plaintiff's claim that there is a balance of RM1,895,825.13 owing by them to the plaintiff as at 31 December 1995. The defendant pointed out

that the sum of RM649,915.49 claimed as "amount advanced" is not true at all and contended it is clearly evidenced by the plaintiff's own bank statements that the total principal sum advanced by the plaintiff to the defendant pursuant to the secured bridging loan was only RM470,360.61. The defendant then averred that the arrears of interest after the lapse of six years from the date the sum became due or purportedly became due cannot be claimed by the plaintiff pursuant to s. 21(5) of the Limitation Act 1953.

In The High Court

[10] On 8 August 1997 the learned judge of the High Court gave an order, *inter alia*, for sale of the said lands by public auction to recover the sum of RM2,399,918 owed by the defendant to the plaintiff as at 8 August 1997 together with interest accruing thereon at the rate of 3.5% above the plaintiff's BLR per annum at monthly rests from 8 August 1997 to the date of realisation (the daily interest is currently at RM822.85 until capitalisation of interest on 31 August 1997) in accordance with the terms of the three charges.

[11] In his grounds of judgment, the learned judge said the guidelines dealing with order for sale under s. 256 of the Code has been laid down in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 where the Federal Court held that "cause to the contrary" within s. 256(3) of the Code might be established only in three categories of cases, namely:

(i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code;

(ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

(iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity;

and if no cause to the contrary could be shown, the court would be obliged to make an order for sale.

[12] The learned judge made further reference to the judgment in *Low Lee Lian* where the Federal Court opined that there must be a speedy and summary trial and attention being paid to the following:

A (a) whether the chargee has given statutory notice;

(b) whether O. 83 of the Rules of the High Court was complied; and

(c) whether there is cause to the contrary.

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[13] The learned judge was of the view that based on the decision in *Low Lee Lian*, the plaintiff's failure to release the loan monies, the raising of interest to 3.5% above the BLR and the differences in the statements of account do not amount to cause to the C contrary under s. 256(3) of Code. On the issue of limitation, the learned judge was of the view that it is correct that according to cl. 1 of the charge the defendant's liability to pay depends on what was claimed by the plaintiff and in this case, the plaintiff's letter of demand dated 20 September 1995 was for payment of the sum of D RM1,832,893.46 being the amount owing by the defendant to the plaintiff as at 13 September 1995 together with interest thereon at the rate of 3.5% above the plaintiff's BLR (currently at 7.55%) per annum with monthly rests to be made within seven days to the date thereof and so it is not correct to say that plaintiff claimed arrears E of interest beyond the six years period.

[14] In conclusion the learned judge ruled that the defendant has failed to show any cause to the contrary under s. 256(3) of the Code and as such allowed the plaintiff's application.

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The Appeal

[15] In his submission, learned counsel for the defendant highlighted the following:

G (a) that the plaintiff's affidavit in support of the application for order for sale stated the state of the account with particulars as follows:

(i)	Amount advanced	RM649,915.49
H (ii)	Total amount of Repayments	RM Nil
(iii)	Total amount of Interest in arrears	RM1,245,909.64
	Balance outstanding as at 31 December 1995	RM1,895,825.13;

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(b) thereafter the plaintiff affirmed the state of the accounts in three other affidavits where they repeated and reiterated the amount advanced as RM649,915.49 and gave the updated amount of interest in arrears as RM1,407,928.05, RM1,490,394.72 and RM1,727,617.78;

(c) on 8 August 1997 the learned judge gave an order for sale of the said lands by public auction to recover the sum of RM2,399,918.00 owed by the defendant to the plaintiff at 8 August 1997 with interest thereon at 3.5% above BLR from 8 August 1997 till date of full realisation.

[16] Our decision to allow the appeal by the defendant were premissed on the following issues canvassed by learned counsel for the defendant, namely:

(a) that the plaintiff has failed to comply with the statutory provisions of O. 83 r. 3(6) of the Rules of the High Court which provides that where the plaintiff claims payment of monies secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in para. (3); and

(b) that the plaintiff's supporting affidavit and also the subsequent affidavits did not state the correct statutory particulars, namely:

(i) the correct amount of the advance;

(ii) the correct interest in arrears;

(iii) the correct amount remaining due under the charge;

(c) that the plaintiff wrongly stated the amount of the advance as RM649,915.49 when in fact the plaintiff's own affidavit stated that the facility was restructured from RM550,000 to RM520,000 only; further, the report by Peat Marwick Consultants Sdn Bhd (KPMG Report) adduced in evidence stated that the bridging loan disbursed by the plaintiff was in fact only RM520,000 and the balance amounting to RM30,000 was not disbursed;

(d) that the plaintiff's affidavit affirmed on 23 August 1996 also did not give the correct amount due under the charge in that the sum claimed as outstanding as on 9 April 1996 was

RM2,021,042.35 whereas the plaintiff's own bank statement as on 30 April 1996 (inclusive of interest) showed an amount of RM1,972,298.44 only;

(e) that the plaintiff therefore have claimed in their Form 16D notice and originating summons sums which they are not entitled to and which are not lawfully due to them.

[17] In opposing the appeal, learned counsel for the plaintiff conceded that there was no compliance with O. 83 of the Rules of the High Court. He also agreed that the amount advanced as claimed was erroneous, *viz* its should be RM520,000 and not RM649,915.49. Be that as it may, in his written submission on these issues, learned counsel for the plaintiff canvassed as follows:

(i) The plaintiff submits that the requirements in O. 83 have been observed. This is adequately evidenced in the plaintiff's affidavit supporting the OS as well as the reply written submissions prepared by the plaintiff;

(ii) In any event, the plaintiff submits that a mere failure to give details and particulars did not raise a 'cause to the contrary' pursuant to s. 256(3) of the NLC.

[18] With regards to the issue as to whether it would be a "cause to the contrary" where the notice demands sums not lawfully due from the chargee, we would refer to *Low Lee Lian*, *supra,* where Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Federal Court said (at pp. 45-46):

> ..., a chargor may show cause to the contrary within s. 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. **So too, where the notice demands sums not lawfully due from the chargee**. See *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467; However in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale. [Emphasis added]

[19] In relation to the issue on failure to comply with the requirements of O. 83 r. 3(6) read with O. 83 r. 3(3) of the Rules of the High Court, we would refer to *Bank Pertanian Malaysia v. Zainal Abidin Kassim & Anor* [1995] 1 LNS 33 where Mohd Hishamudin J (as he then was) said:

> In my opinion, the failure to comply with rr. 3(6) and 3(3), in particular, **the failure to state**:
>
> **(a) the amount of the repayments; and**
>
> **(b) the amount of instalments in arrear,**
>
> **are serious omissions which warrant a dismissal of the action; for the absence of such pertinent information is highly prejudicial to the defendants**. ... Fairness requires the chargee not only to state in the affidavit but also to state accurately the amount of repayments made and the amount of instalments in arrear. It hardly needs to be reiterated here that the purpose of the rule is also to protect the interest of the debtor/chargor. [Emphasis added]

We were of the same view.

[20] With regards to O. 83 r. 3 of the Rules of the High Court, Mahadev Shankar J (as he then was) in *Citibank NA v. Ibrahim Othman* [1993] 1 LNS 104 said:

> The objective of the present legislation is to enable the chargee to know at least by the date the originating summons is filed, what is the exact sum he is legally liable to pay. What has to be shown is the state of the account with the statutory particulars. If there is a dispute as to the amount payable, the court must be able to say precisely when making its order 'the total amount due to the chargee at the date on which the order is made'. These words are from s. 257(1)(c) of the NLC and they are mandatory.
>
> It is a well-established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O. 83 r. (3)(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg, for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order. *Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant*. [Emphasis added]

[21] Following the authorities referred to above with which we agree, we were of the view that in the instant appeal, since the statutory demand in Form 16D was for a sum greater than that owed by the defendant, it was accordingly a wrongful demand for payment and that would certainly constitute cause to the contrary. The learned judge failed to deal with these issues in making the decision that he did and for these reasons we had allowed the appeal with costs and ordered that the order for sale be set aside. We had also ordered the deposit be remitted to the defendant to account of taxed costs.